FILED BY CLERK
AUG 21 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KAREN MACKENZIE, a single woman, Plaintiff/Appellant, v. RICHARD J. MANGANIELLO, as Trustee of the Richard J. Manganiello Family Trust; and RICHARD J. MANGANIELLO, a single man, Defendants/Appellees.	2 CA-CV 2008-0020 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20035999

Honorable John F. Kelly, Judge

AFFIRMED

Weeks & Laird, PLLC
By Stephen M. Weeks
Tucson
Attorneys for Plaintiff/Appellant

George M. Donaldson
Tucson
Attorney for Defendants/Appellees

H O W A R D, Presiding Judge.

¶1 After a bench trial, the trial court ruled that appellant Karen MacKenzie was equitably estopped from enforcing a restrictive covenant setback requirement against her neighbor, appellee Richard Manganiello. It also granted Manganiello attorney fees, expenses, and damages. MacKenzie challenges both rulings on appeal. Because the trial court did not abuse its discretion or err, we affirm.

Facts

¶2 We view the facts in the light most favorable to upholding the trial court's judgment. *Sw. Soil Remediation, Inc. v. City of Tucson*, 201 Ariz. 438, ¶ 2, 36 P.3d 1208, 1210 (App. 2001). MacKenzie owns a lot adjacent to one owned by Manganiello in a subdivision subject to a declaration of conditions, reservations, and restrictions (CRRs). The CRRs provide: "No building, structure, fence, hedge, outbuilding or appurtenance of any nature shall be located closer than thirty feet (30') from any lot or property line."

¶3 When Manganiello purchased his lot in October 2002, MacKenzie owned her property as a joint tenant with John Kolakowski.[1] Before building his house, Manganiello presented to Kolakowski a proposed written waiver of the thirty-foot setback requirement. Kolakowski signed the waiver on behalf of himself and MacKenzie. The subdivision's homeowners' association (association) subsequently approved Manganiello's building plans,

[1]Kolakowski subsequently conveyed his interest in the property to MacKenzie in a warranty deed recorded October 31, 2003.

and Manganiello began construction in May 2003. Manganiello does not dispute that his house encroaches on the thirty-foot setback.

¶4 On August 28, 2003, MacKenzie sent letters to Manganiello and the association demanding Manganiello's construction stop and stating the waiver was fraudulent. Manganiello received the letter but did not respond. In September, an attorney retained by MacKenzie sent a letter to the association, again stating the waiver was fraudulent and demanding that Manganiello be ordered to cease construction. An attorney representing the association responded in writing and asserted MacKenzie had told the association's architectural committee representative, Alan Rosen, that Kolakowski had her permission to act on her behalf with respect to all matters related to the construction on Manganiello's lot and that MacKenzie was equitably estopped from repudiating her waiver.

¶5 MacKenzie sued Manganiello approximately one month later.[2] After a two-day bench trial, the court entered judgment in favor of Manganiello, finding that MacKenzie had given Kolakowski authority to act on her behalf and that she was equitably estopped from enforcing the setback restriction. The court also awarded Manganiello attorney fees, damages, and expenses as a sanction. MacKenzie now appeals.

---

[2]In a previous appeal, the parties challenged the trial court's rulings with respect to cross-motions for summary judgment on MacKenzie's claim, a motion for summary judgment on a counterclaim filed by Manganiello, and Manganiello's motion to add a party. This court affirmed the rulings in favor of MacKenzie on Manganiello's counterclaim and on his motion to add a party, reversed the court's grant of summary judgment to Manganiello on MacKenzie's claim, and remanded for further proceedings. *MacKenzie v. Manganiello*, No. 2 CA-CV 2004-0120 (memorandum decision filed Mar. 1, 2005).

Equitable Estoppel

¶6 MacKenzie first argues the trial court erred in finding she had authorized Kolakowski to act for her in all matters related to Manganiello's construction, including signing the waiver in her name.[3] She reasons that, in the absence of such authority, the first element of equitable estoppel, an act inconsistent with her later position, is missing.

¶7 We review a trial court's decision regarding application of estoppel for an abuse of discretion. *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, ¶ 27, 156 P.3d 1149, 1155 (App. 2007). We defer to the court's factual findings unless they are clearly erroneous but review conclusions of law de novo. *Id.* ¶ 9. A factual finding, including a finding of agency, is not clearly erroneous if substantial evidence supports it. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 58, 181 P.3d 219, 236 (App. 2008); *Ruesga v. Kindred Nursing Ctrs. W., L.L.C.*, 215 Ariz. 589, ¶ 26, 161 P.3d 1253, 1261 (App. 2007). When the record contains substantial evidence to support the court's findings, we will not reweigh conflicting evidence on appeal. *Ruesga*, 215 Ariz. 589, ¶ 27, 161 P.3d at 1261.

¶8 Equitable estoppel requires evidence that one party took actions inconsistent with a position it later adopted, that the other party relied on those actions, and that the

---

[3]In her reply brief, MacKenzie claims Manganiello did not raise the issue of agency in the pretrial statement and asserts the issue is therefore waived. Issue 3.2 of the joint pretrial statement lists as an issue: "Did Kolakowski forge MacKenzie's signature on the waiver, or did he have authority, actual (express) or apparent, to consent to the waiver and sign it on behalf of himself and MacKenzie?" Her claim is therefore incorrect.

other party was injured by the first party's repudiation of its earlier conduct. *See Flying Diamond Airpark*, 215 Ariz. 44, ¶ 28, 156 P.3d at 1155. "The party to be estopped must induce reliance 'by his acts, representations or admissions intentionally or through culpable negligence.'" *Id., quoting LaBombard v. Samaritan Health Sys.*, 195 Ariz. 543, ¶ 12, 991 P.2d 246, 249-50 (App. 1998). The court will consider acts committed by an agent of the party to be estopped when determining if the elements of equitable estoppel have been met. *See Dunn v. Progress Indus., Inc.*, 153 Ariz. 62, 64, 734 P.2d 604, 606 (App. 1986); *see also Barlage v. Valentine*, 210 Ariz. 270, ¶ 16, 110 P.3d 371, 376 (App. 2005) ("[W]hen an agent acts . . . it is as if the principal herself has acted.").

¶9 "'Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.'" *Ruesga*, 215 Ariz. 589, ¶ 28, 161 P.3d at 1261, *quoting* Restatement (Third) of Agency § 1.01 (2006).

> "The relation of agency need not depend upon express appointment and acceptance thereof, but may be, and frequently is, implied from the words and conduct of the parties and the circumstances of the particular case. If, from the facts and circumstances of the particular case, it appears that there was at least an implied intention to create it, the relation may be held to exist, notwithstanding a denial by the alleged principal, and whether or not the parties understood it to be an agency."

Canyon State Canners, Inc. v. Hooks, 74 Ariz. 70, 73, 243 P.2d 1023, 1024 (1952), *quoting* 2 C.J.S. *Agency* § 23, at 1045-46. Although the status of parties as joint tenants

will not by itself create an agency relationship, *Ferree v. City of Yuma*, 124 Ariz. 225, 227, 603 P.2d 117, 119 (App. 1979), the court may consider the parties' relationship "to each other and to the subject matter," as well as other circumstances indicating agency authority. *O.S. Stapley Co. v. Logan*, 6 Ariz. App. 269, 273, 431 P.2d 910, 914 (1967) (allowing employees to run business during employer's absence created apparent authority to enter contract); *see also Ruesga*, 215 Ariz. 589, ¶ 35, 161 P.3d at 1263 (wife's history of making decisions on behalf of husband constituted circumstantial evidence of agency relationship).

¶10 Here, the trial court found MacKenzie had given Kolakowski "permission to act on her behalf with regard to all matters involved in the construction on [Manganiello's] lot, which would necessarily encompass permission to sign the waiver on her behalf." Evidence was presented at trial that MacKenzie and Kolakowski owned the house as joint tenants with right of survivorship, lived together as a couple, and shared joint bank accounts. Kolakowski generally took care of paying bills and other "household things" on behalf of the couple. During the relevant time period, MacKenzie worked long hours while Kolakowski was generally at home. MacKenzie had previously authorized Kolakowski to act on her behalf in negotiations over a waiver with a prospective buyer of the same lot that Manganiello eventually bought. Kolakowski had informed MacKenzie of the buyer's concern that the "lot was small and it would be difficult to build on" and that waivers would be required. When Manganiello bought the lot, Kolakowski and Manganiello had several conversations about construction on the lot and the need for a waiver. MacKenzie was

present for at least a portion of one of these conversations. Finally, on two different occasions, MacKenzie informed Rosen, the association's architectural committee, and a board member, that Kolakowski "was representing her" on all matters related to the construction of Manganiello's house, that Kolakowski had authority "to act fully on her behalf," and that she "did not wish to be or did not see the need to be involved in the details."

¶11 The foregoing constitutes substantial evidence to support the trial court's finding that Kolakowski had authority to sign the waiver on MacKenzie's behalf. *See Ruesga*, 215 Ariz. 589, ¶ 26, 161 P.3d at 1261. The waiver constituted an act inconsistent with the position MacKenzie later adopted when she repudiated the waiver. It therefore satisfies the first element of equitable estoppel. *See Flying Diamond Airpark*, 215 Ariz. 44, ¶ 28, 156 P.3d at 1155.

¶12 MacKenzie relies on her own testimony and Rosen's in asserting that she never specifically told Rosen that Kolakowski could sign the waiver. But the trial court found signing the waiver was within the scope of her delegation of authority. *See Bud Antle, Inc. v. Gregory*, 7 Ariz. App. 291, 293, 438 P.2d 438, 440 (1968) (scope of agent's authority question of fact). Rosen testified MacKenzie had told him Kolakowski was authorized "to act fully on her behalf." That delegation includes signing the waiver, and the trial court's finding therefore is not clearly erroneous.

¶13 MacKenzie also asserts there is no evidence that Kolakowski thought he was acting subject to MacKenzie's control or that he accepted agency responsibility. But the trial court could find the facts stated above establish circumstantial evidence of each of these elements. *See Ruesga*, 215 Ariz. 589, ¶¶ 31-32, 161 P.3d at 1262 (circumstantial evidence can prove agency).

¶14 MacKenzie further argues the trial court was required to find that Kolakowski believed MacKenzie wanted him to act. But, again, the trial court found that MacKenzie had designated Kolakowski as her representative with regard to the property and had authorized him "to act on her behalf." Kolakowski's signing of the waiver is within the scope of that authority and is circumstantial evidence that he believed she wanted him to do so. *See id.*

¶15 MacKenzie also cites an example from the Restatement (Third) of Agency § 6.10 (2006) for the proposition that she is not responsible for Kolakowski's "unauthorized action." But that example, involving co-owners of property, is predicated on a finding that "no actual or apparent authority" exists. Restatement § 6.10 cmt. b, illus. 1. As already explained, the trial court in this case found that actual authority did exist, and substantial evidence supports this finding.

¶16 MacKenzie next challenges the trial court's finding of justifiable reliance, focusing on the fact that she and Manganiello had very little direct contact. But Kolakowski's authorized acts were her own. *See Barlage*, 210 Ariz. 270, ¶ 16, 110 P.3d

at 376 (agent's actions are principal's actions). Manganiello had relied on the waiver by using it to obtain approval from the association to begin construction of his house. Thus, the record supports the court's finding that Manganiello justifiably relied on the waiver Kolakowski executed on MacKenzie's behalf.

¶17 Additionally, MacKenzie challenges the trial court's finding of injury. The court could find Manganiello would be injured by MacKenzie's repudiation of the waiver because, when she first challenged its validity, he had constructed an eleven-foot retaining wall and had expended approximately $51,000. Moreover, Manganiello presented evidence that it would cost an estimated $50,000 more to change his plans to comply with the setback restriction.

¶18 At oral argument, MacKenzie argued for the first time that the record does not support a finding that Manganiello was aware of and relied on Kolakowski's agency status, citing *Cameron v. Lanier*, 56 Ariz. 400, 108 P.2d 579 (1940). Arguments raised for the first time at oral argument are waived. *See Mitchell v. Gamble*, 207 Ariz. 364, ¶ 16, 86 P.3d 944, 949-50 (App. 2004). Additionally, we find nothing in *Cameron* supporting a different result here.

¶19 At oral argument, MacKenzie also argued for the first time that the record does not show when she made her statements concerning Kolakowski's agency to Rosen, contending that these admissions therefore are insufficient to show that Kolakowski was her agent at the relevant time of the signing of the consent. Again, arguments raised for the first

time at oral argument are waived. *See Mitchell*, 207 Ariz. 364, ¶ 16, 86 P.3d at 949-50. Moreover, the trial court relied on additional facts, many of which clearly preceded the time of the signing, to find that Kolakowski was MacKenzie's agent at the time of the signing.

¶20 The record contains substantial evidence supporting all three elements of equitable estoppel. The trial court's findings therefore are not clearly erroneous, and the court did not abuse its discretion in applying estoppel.[4] *See Flying Diamond Airpark*, 215 Ariz. 44, ¶ 27, 156 P.3d at 1155.

Intentional Wrongdoer

¶21 MacKenzie also claims the trial court erred in concluding that Manganiello was not an intentional wrongdoer. "Equitable principles govern the enforcement of restrictive covenants by injunction," and equitable remedies will "'not be used to protect an intentional wrongdoer.'" *Flying Diamond Airpark*, 215 Ariz. 44, ¶ 10, 156 P.3d at 1152, *quoting Decker v. Hendricks*, 97 Ariz. 36, 42, 396 P.2d 609, 612 (1964); *see also Cook v. Great W. Bank & Trust*, 141 Ariz. 80, 86, 685 P.2d 145, 151 (App. 1984) (estoppel inapplicable when party asserting it has committed misconduct against party to be estopped).

¶22 Here, the court found that Manganiello had acted in good faith in obtaining the waiver and that his reliance on the waiver was justified. The substantial evidence summarized above supports these findings, and thus the court did not "clearly err[]" in

[4]Because we are affirming the trial court's decision on equitable estoppel grounds, it is unnecessary to address Manganiello's argument that we could affirm on various other grounds.

finding Manganiello was not an intentional wrongdoer. *Flying Diamond Airpark*, 215 Ariz. 44, ¶ 23, 156 P.3d at 1154.

Attorney Fees

¶23 MacKenzie also challenges the trial court's order granting Manganiello attorney fees, expenses, and damages pursuant to A.R.S. §§ 12-341.01(C) and 12-349. We will uphold the court's findings of fact unless clearly erroneous but review its application of the attorney fee statutes de novo. *Phoenix Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 244, 934 P.2d 801, 808 (App. 1997).

¶24 The trial court found that MacKenzie's claim "was not made in good faith, was groundless and constituted harassment." On appeal, she challenges only the court's finding that her claim was groundless. However, she does not cite any relevant case law, nor does she directly address the obvious basis for the finding that her claim was groundless—namely, that she had given Kolakowski authority to act on her behalf, the association's attorney had reminded her of that, and she knew it when she filed her lawsuit. MacKenzie attempts to pick away at peripheral evidentiary issues but does not argue or explain how her claim was "fairly debatable" in view of her delegation of authority to Kolakowski. *City of Casa Grande v. Ariz. Water Co.*, 199 Ariz. 547, ¶ 30, 20 P.3d 590, 599 (App. 2001). The trial court's findings are supported by substantial evidence and thus not clearly erroneous. Based

on the arguments presented, we conclude the trial court did not err in awarding Manganiello attorney fees, expenses, and damages under § 12-349.[5]

Conclusion

¶25 In light of the foregoing, we affirm the judgment of the trial court. We also grant Manganiello's request for attorney fees on appeal pursuant to § 12-341.01(A), in an amount to be determined upon his compliance with Rule 21, Ariz. R. Civ. App. P. However, we deny his request for fees and damages pursuant to Rule 25, Ariz. R. Civ. App. P., and also deny his request that we award him fees in the amount awarded to MacKenzie on the first appeal.

_____
JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

_____
JOHN PELANDER, Chief Judge

_____

[5]Because we uphold the award of fees, expenses, and damages under § 12-349, we need not address the award under § 12-341.01(A), which MacKenzie does not challenge, or under § 12-341.01(C).

J. WILLIAM BRAMMER, JR., Judge